

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Orig w/ affidavit of mailing

75-1375

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1375

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHNNIE A. NORMAN,

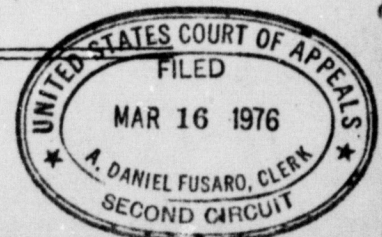
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.



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Colloquy between the Court and Defense Counsel 132-142
at trial - September 4, 1975

9 1
2 I had a little bit of a problem with the defen-
3 dant and I'd like to make this statement: My client, as I
4 indicated before, has some problems with alcohol and he has
5 also been having epileptic seizures.

6 His sister tells me he had a seizure last night
7 and has a bleeding ulcer and cirrhosis of the liver.

8 THE COURT: Has he had a seizure in court?

9 MS. SEYBERT: Not in court.

10 THE COURT: In your presence?

11 MS. SEYBERT: Not that I can discern.

12 THE COURT: This is what someone else told you?

13 MS. SEYBERT: Yes and I am advised that he took
14 some medication.

15 Now, he wants to proceed with the trial and he
16 would testify if we go ahead but I have a bit of difficulty
17 in determining whether or not he can fully comprehend the
18 situation here.

19 THE COURT: Have you had difficulty up to now
20 in discerning that?

21 MS. SEYBERT: At some points, yes.

22 THE COURT: When he spoke to you yesterday -- and
23 he was speaking quite loudly -- was there any difficulty?

24 MS. SEYBERT: Not at that point.

25 THE COURT: Definitely not. The Court saw none.

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2 He has been sitting in court, he has been quiet and when you
3 spoke to him he apparently responded.

4 Now you are telling me about difficulties which
5 occurred outside the trial or aside from the times you were
6 in court?

7 MS. SEYBERT: Yes. This is what the sister told
8 me.

9 THE COURT: Did any of them occur in your office?

10 MS. SEYBERT: No.

11 THE COURT: These are all things people told you.

12 MS. SEYBERT: Yes. Your Honor, his sister is
13 here today.

14 THE COURT: Are you having a problem today?

15 MS. SEYBERT: Well, it's difficult to say. It's
16 always been difficult to communicate --

17 THE COURT: Have you had a problem?

18 MS. SEYBERT: Well, he's not as alert as I would
19 expect him to be.

20 THE COURT: Well, in court, there has been times
21 when witnesses said something and he has been very alert and
22 he has been very responsive. He responded by facial expressions
23 and sometimes by statements. Have you noticed this?

24 MS. SEYBERT: At times, yes.

25 THE COURT: You know it did happen.

1 MS. SEYBERT: Yes.

2
3 THE COURT: Well, the Court has seen nothing and
4 evidently, from what you tell me, you have seen nothing --

5 MS. SEYBERT: Not specifically.

6 THE COURT: And you have seen nothing but you
7 are now telling the Court about something which appeared in
8 some other area or away from you?

9 MS. SEYBERT: Yes.

10 THE COURT: You can put anything you want on the
11 record.

12 MS. SEYBERT: I believe it is being taking down
13 now.

14 I wanted to inform the Court that his sister
15 advised me that he had an epileptic seizure, bleeding ulcer
16 and that's why he holds his stomach continuously and he has
17 cirrhosis of the liver and he has taken medication.

18 THE COURT: Do you think that he is prepared to
19 go forward today?

20 MS. SEYBERT: I think he may have some difficulty
21 in testifying.

22 THE COURT: What is your consideration after
23 speaking to him?

24 MS. SEYBERT: I think the medication had some
25 effect on him and his speech is slower --

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THE COURT: How do you know he took it?

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MS. SEYBERT: I was informed.

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THE COURT: You are saying a lot of things but you are not saying much because you don't even know that he took it.

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MS. SEYBERT: I don't know.

8

THE COURT: You may continue.

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MS. SEYBERT: I wanted to bring it to the Court's attention.

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THE COURT: You bring it to the Court's attention to say this man is not in a position to go forward?

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MS. SEYBERT: I feel that is the defendant's choice, your Honor.

15

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THE COURT: Have you had him examined by a doctor today?

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MS. SEYBERT: No, but there is a doctor in court.

18

THE COURT: Has he spoken with him?

19

MS. SEYBERT: Previously.

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THE COURT: Did you bring the doctor here to attend to the man or help him?

22

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MS. SEYBERT: I brought him in as a witness if permitted to do so. He treated him at Pilgrim State Hospital.

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THE COURT: Perhaps you can use him and he can testify to what he knows.

1 MS. SEYBERT: Right.

2 THE COURT: Surely.

3 MS. SCHWARTZ: Is he going to testify about intoxication?
4 Is he going to testify about the medical history of
5 the defendant?
6

7 MS. SEYBERT: Basically, the doctor would testify
8 that he was the individual who examined the defendant in Feb-
9 ruary of 1975 and he would state his diagnosis of the defendant.

10 He would also state --

11 THE COURT: Maybe we should have an offer of proof
12 as to this and we will see whether or not it is relevant or
13 just what the Government's position will be.

14 MS. SEYBERT: Okay.

15 THE COURT: Anything further?

16 MS. SEYBERT: No.

17 THE COURT: Anything further on his condition that
18 you want to put on the record?

19 MS. SEYBERT: No. I would suggest that I have
20 the doctor speak with him for a while and based on prior treat-
21 ment of the defendant, he could determine whether he believes
22 any medication would affect him today.

23 THE COURT: Well, is this something that you say
24 could happen or is this something you believe the doctor might
25 say could happen?

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You see, you don't know if he took medication,
what medication and what affect it would have on him.

MS. SEYBERT: That's right.

THE COURT: But you believe by talking to him the
doctor could say whether or not it would affect the way he
testifies today?

MS. SEYBERT: It might. I wouldn't know, your
Honor.

THE COURT: Well, I wouldn't know either.

Now, let me ask you, if he drunk?

MS. SEYBERT: No. I can't smell alcohol on his
breath.

THE COURT: Have you smelled it during the time
he has been in court on this case?

MS. SEYBERT: I think one time I might have.

THE COURT: When was that?

MS. SEYBERT: I can't remember the specific date.

THE COURT: We have only been on this case --
how many days -- this is Wednesday so it would have to be
Monday or Tuesday.

MS. SEYBERT: I think it probably was on Monday.

THE CLERK: We had a holiday Tuesday.

THE COURT: Tuesday, Wednesday and Thursday are
the dates.

MS. SEYBERT: It might have been Tuesday but 132

I'm not indicating that it was an overpowering amount of alcohol. He might have been standing next to someone else who was drinking.

THE COURT: Has alcohol impaired his ability to communicate with you since on trial in this case?

MS. SEYBERT: No.

THE COURT: Now, Tuesday and Wednesday we were on trial and today is Thursday. On any of these three days do you want to say this man was drunk and unable to attend to himself?

MS. SEYBERT: No.

THE COURT: Was he lucid then?

MS. SEYBERT: Yes.

THE COURT: All right.

MS. SCHWARTZ: This whole subject reminds me that I wanted to request that perhaps you could add to the intoxication charge that mere drinking is not the equivalent of being intoxicated and the jury should consider that as well.

THE COURT: Well, we don't know how much he drank.

MS. SCHWARTZ: That's right. They should not be allowed to reach the conclusion that because he was intoxicated that he was drunk on March 5, 1973. They should not conclude that merely because there is testimony that he was

1 drinking that he was intoxicated, automatically.

2 MS. SEYBERT: I would object to that.

3 There has been testimony that he had been drink-
4 ing and it is for the jury --

5 THE COURT: We don't know how much or that he was
6 intoxicated to any extent.

7 MS. SEYBERT: I object. It indicates to the jury
8 that although they find he was drinking they must not find
9 intoxication.

10 THE COURT: She is saying that mere drinking is
11 not evidence that he was intoxicated.

12 MS. SEYBERT: Well, I think it is a graduated
13 thing. One has to drink to become intoxicated. It is con-
14 tradictory.

15 THE COURT: Why?

16 MS. SEYBERT: You have to drink --

17 THE COURT: She says, if you have one drink it
18 doesn't mean that you are intoxicated --

19 MS. SEYBERT: Depending on the person.

20 He appeared to have had been drinking. Whether or
21 not he was intoxicated --

22 THE COURT: Is it your position that he was drunk,
23 unable to take care of himself? Is that your position?

24 MS. SEYBERT: Yes -- at that point.

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THE COURT: Well, if that's your position then mere drinking is not evidence that he was intoxicated because mere drinking is not evidence of intoxication.

THE LAW CLERK: At the end of the intoxication charge it says, "If the evidence in the case leaves the jury with a reasonable doubt whether because of the degree of his intoxication the mind of the accused was capable of forming or did form specific intent," etc., etc.

I would think because the charge speaks in terms of degrees of intoxication affecting specific intent that a conclusion of intoxication wouldn't negate specific intent.

Whatever the jury considers as to intoxication, it would have to be the degree that negates specific intent and therefore it may not be necessary to define intoxication for them.

That's just one point I wanted to raise.

MS. SCHWARTZ: Perhaps if it were just a clarifying statement such as, to the effect, that the jury may find that the defendant was or was not intoxicated on the evidence that has been submitted. However, then continue, that it is the degree of intoxication which has to be sufficient to impair his judgment.

THE COURT: His ability to act.

1
2 in this case.

3 THE COURT: Yes.

4 MS. SEYBERT: I would go along with that charge,
5 your Honor.

6 THE COURT: All right. Put that in.

7 THE LAW CLERK: Can we have the Court Reporter
8 repeat exactly what Government counsel said. I'm not sure I
9 can.

10 (Record read by reporter.)

11 (Record read as follows:)

12 "MS. SCHWARTZ: Perhaps if it were just a clari-
13 fying statement such as, to the effect, that the jury may
14 find that the defendant was or was not intoxicated on the
15 evidence that has been submitted. However, then continue,
16 that it is the degree of intoxication which has to be suffi-
17 cient to impair his judgment."

18 MS. SEYBERT: However, it is the degree of intox-
19 ication which must impair his judgment, and ability to act with
20 the necessary specific intent.

21 THE COURT: I believe that is included in Devitt
22 and Blackmer -- if the evidence in a case leaves the jury with
23 a reasonable doubt whether because of the degree of intoxica-
24 tion the mind of the accused, etc., etc. I feel that it is
25 included.

1
2 MS. SEYBERT: I would suggest merely inserting
3 the sentence that the jury may or may not find him to be in-
4 toxicated just before that paragraph about the degree of
5 intoxication.

6 THE LAW CLERK: So, in other words, present this
7 sentence, "The jury may find the defendant was or was not
8 intoxicated" between the paragraph that begins, "would be
9 some evidence if the defendant acted or failed to act" --
10 so it would be in there.

11 MS. SEYBERT: Right.

12 MS. SCHWARTZ: Yes.

13 THE COURT: That will be it.

14 The jury may find the defendant was or was not
15 intoxicated on the evidence that has been submitted.

16 If the evidence leaves the jury with a reasonable
17 doubt whether because of the degree of intoxication the accused
18 was capable or incapable of committing the crime charged, the
19 jury should acquit the accused.

20 THE LAW CLERK: I just have to include, "The
21 defendant takes the stand" for, "doesn't take the stand"
22 because apparently he will take the stand.

23 THE COURT: All right, "The defendant takes the
24 stand."
25

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 16th-----
day of March, 1976-----, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a ----- GOVERNMENT'S APPENDIX -----
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Wm. J. Gallagher, Esq.

Legal Aid Society
Fed. Defender Services Unit

509 U.S. Courthouse
Foley Square

New York, N.Y. 10007-----

Sworn to before me this
16th day of March, 1976

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen